No. 12033

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ESTATE OF H. M. HOLLOWAY, Deceased, HARVEY S. HOLLOWAY, Executor,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S OPENING BRIEF.

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Opinion Below.

The Findings of Fact and Opinion of the Tax Court [R. 14-25] are reported at 10 T. C. ..... No. 110.

Jurisdiction.

Notice of deficiency was mailed to H. M. Holloway on May 9, 1946 [R. 8-10], proposing a deficiency in gift tax for the calendar year 1944 in the sum of $6,421.41. The petition to The Tax Court was filed on June 28, 1946 [R. 4-10], pursuant to Section 1012(a) of the Internal Revenue Code. Issue was joined by the filing of the Commissioner's answer on August 20, 1946. [R. 11-12.] H. M. Holloway died on October 4, 1947, and on motion duly made the executor of his estate, Harvey S. Holloway, was substituted as petitioner. [R. 12-14, 33.]

The cause was heard by the Honorable Richard L. Disney, Judge of The Tax Court, on December 2, 1947. [R.

35-61.] The Tax Court's Findings of Fact and Opinion, two judges dissenting, were promulgated May 13, 1948 [R. 14-25]; and on the same date decision was entered sustaining the Commission's determination of said deficiency of $6,421.41. [R. 25-26.] This petition for review was filed and notice thereof served upon Counsel for Respondent on August 9, 1948. [R. 62-69.]

The gift tax return of H. M. Holloway for the year 1944 was filed with the Collector of Internal Revenue for the Sixth District of California, at Los Angeles. [R. 4 and 11.] The petition for review was filed pursuant to Section 1142 and jurisdiction of this Court is invoked under Section 1141 of the Internal Revenue Code.

Statute Involved.

Section 1000(d) of the Internal Revenue Code, added by Section 453 of the Revenue Act of 1942, read as follows during the year 1944:

> "(d) Community Property.—All gifts of property held as community property under the law of any State, Territory, or possession of the United States, or any foreign country shall be considered to be the gifts of the husband except that gifts of such property as may be shown to have been received as compensation for personal services actually rendered by the wife or derived originally from such compensation or from separate property of the wife shall be considered to be gifts of the wife."

Section 371 of the Revenue Act of 1948 abolished the foregoing rule for the future, by adding:

> "This subsection shall be applicable only to gifts made after the calendar year 1942 and on or before the date of the enactment of the Revenue Act of 1948."

Statement of the Case.

On August 21, 1944, H. M. Holloway and his wife, Mary L. Holloway, made a gift to their son and daughter and daughter-in-law of 777 shares of the outstanding 800 shares of stock in H. M. Holloway, Inc., having an agreed value of $97,125.00. H. M. Holloway and his wife Mary each filed a gift tax return for 1944 reporting one-half of the gift and paying the gift tax shown due thereon. [R. 33.] The Commissioner proposes to tax the entire gift to H. M. Holloway upon the ground, as stated in the notice of deficiency, that—

> "* * * all of the properties given were community properties of the donor-husband and his wife, none of it having been received as compensation for personal services actually rendered by the wife or derived originally from such compensation or from the separate property of the wife, and are gifts of the donor-husband." [R. 10.]

Thus, the basic issue is whether, within the meaning of Section 1000(d), above quoted, any part of the property given away was received as compensation for personal services actually rendered by Mary L. Holloway or was derived originally from such compensation or from her separate property.

H. M. Holloway, Inc., the shares of which were the subject of the gift, was incorporated only three weeks prior to the date of gift, to-wit, on August 1, 1944. Its 800 shares of stock were issued to and in the name of H. M. Holloway, in exchange for cash and assets (such as tractors, scrapers, tools, equipment and gypsum mining leases) that had been acquired and accumulated by H. M. Holloway and Mary L. Holloway in the conduct of a

gypsum mining business. [R. 34, 38-39.] The origin and growth of said business were as follows [most of the following facts, based upon undisputed evidence, are found in The Tax Court's findings, R. 16-18]:

H. M. Holloway and Mary L. Holloway were married in 1896. They were residents of Los Angeles, California, in 1932 and were then 63 and 56 years of age, respectively. They were penniless. H. M. Holloway secured a job as watchman for an oil company in Lost Hills, California, paying $100.00 per month. Mary joined him in February, 1933, and from that time until 1941 they made their home in a small galvanized iron building on the floor of an abandoned oil derrick. [R. 40, 44, 45, 47.]

While thus employed H. M. Holloway became interested in outcroppings of gypsum in the vicinity, which he began to work with pick, shovel and wheelbarrow. The gypsum was sold to farmers for use as fertilizer. H. M. Holloway built a loading ramp and borrowed a tractor and a plow as operations increased. The farmers would come in their own trucks and load the gypsum themselves. H. M. Holloway's employment as watchman for the oil company terminated in 1935. Thereafter he continued his efforts toward building up a gypsum business on leased properties, the landowners receiving nothing but a royalty based upon sales of gypsum. [R. 46-48, 59.]

Mary L. Holloway performed vital services in the conduct of the business. H. M. Holloway was frequently away from the property, promoting sales of the gypsum, during which times Mary took complete charge of the property and managed the business. On one occasion in 1934 he was away from the property for six or eight weeks, during which time Mary carried on the gypsum

business. She at all times assisted in the details of operation and in keeping the books and records and rendering bills. On several occasions it was necessary to borrow a few hundred dollars, and the notes were always signed by both spouses. [R. 49-50, 52.]

H. M. Holloway recognized that if the business was to become a success, it would be necessary to have the full-time services of someone in addition to himself, and he therefore endeavored to interest young men in working with him to develop the property. On several occasions he persuaded some to work with him in return for room and board, but none would remain permanently. Mary L. Holloway boarded and cooked for such men. In 1934 or 1935, when they were still struggling along, Mary suggested that she would return to Los Angeles to seek paying employment. H. M. Holloway asked her not to go, pointing out that no one else would stay there and help him, and he agreed with her that if she would stay and they made a success of the business together, one-half of the business, of the property acquired and of the income would be hers. She therefore abandoned her plan to return to Los Angeles and worked with him to get the business on its feet. [R. 51, 55-56.]

H. M. Holloway and Mary L. Holloway had accumulated practically no money up to the year 1937. Some time during that year operations were begun on a lease known as the Lang property, located about two miles from the oil derrick. There was no cost to this property other than the payment of a royalty upon extraction of the gypsum. As the business grew and the activities increased equipment was purchased and it was possible to hire help for cash, which relieved Mary of some of her duties. By 1941 there were a number of employees in the business. About

1939 the Holloways' daughter came to live with them and her services also relieved Mary of considerable of her duties. Mary went to the site of the Lang property but a few times. [R. 48, 54, 56-58.]

The business, as heretofore stated, was incorporated on August 1, 1944.

While conceding the rendition by Mary L. Holloway of important services in the early years, the existence and apparent reasonableness of the agreement whereby one-half of the business and its income were to be the property of Mary L. Holloway in recognition of her importance to the enterprise, and that all outside capital needed in the business was obtained upon the joint credit of both spouses, The Tax Court nevertheless held that no part of the property given away was attributable to Mary L. Holloway's services or property within the meaning of Section 1000(d), above quoted. In so concluding The Tax Court made the following three pronouncements, each of which the petitioner believes to be erroneous:

> 1. "* * * The fact that when money was borrowed the notes were signed by both decedent and his wife, indicates a real contribution by her to the development of the business, perhaps commensurate with its size at that time, but obviously it does not comply with the statute nor Regulations, which require that the source of the gift be traced to personal services actually rendered. * * *" [R. 22.]
>
> 2. "* * * Again the fact that decedent and his wife entered into an agreement that half of anything they made would be hers if she would stay at Lost Hills and help him is evidential in a sense as to her activity, but plainly the statute requires, not contract, but personal services." [R. 22-23.]

3. "* * * Upon examination of all of the facts presented by the record, we have found as a fact that decedent's wife at one time contributed some services. Is the gift of stock economically attributable thereto? We do not so consider. The services were performed, in the main, in the earlier years and it appears that there was only a small amount of savings by 1937, when the Lang lease was taken over, and after which she seems to have performed no services. Thus there is a break in the connection between her services and any later business or property. * * *" [R. 23.]

The dissenting opinion stated [R. 24-25]:

"* * * In my opinion the facts found disclose participation by the wife in decedent's business to a degree which greatly exceeds 'a wife's usual duty' and supports a conclusion that her personal services were a substantial factor contributory to business success and *were commensurate with decedent's efforts in the early years.* During those years decedent was employed, sometimes at a great distance from the gypsum deposits. *During his absences the wife managed their private enterprise, and when he was present, she assisted in the details of operation and accounts.* Because her services were valuable, decedent dissuaded her from returning to Los Angeles although their condition of life near the deposits was not pleasant. I am unable to agree with the majority view, feeling that her services were of the type which have supported contrary conclusions in Estate of Frank D. Neumann, 9 T. C. 1120, and E. T. 20, 1947-2 C. B. 207." (Emphasis added.)

Specification of Errors.

Petitioner's Statement of Points is set out in the record at pages 69-71, substantially as follows:

1. The Tax Court erred in holding and deciding that no portion of the gift made in 1944 represented property that had been received as compensation for personal services actually rendered by Mary L. Holloway or was derived originally from such compensation or from her separate property, within the meaning of Section 1000(d) of the Internal Revenue Code.

2. The Tax Court erred in holding and deciding that there was a break in the connection between valuable services rendered by Mary L. Holloway and the property given away in 1944.

3. The Tax Court erred in failing and refusing to hold and decide that H. M. Holloway and Mary L. Holloway, pursuant to a valid and reasonable contract fully supported by adequate consideration, were engaged in a joint enterprise or adventure in which each performed vital services and what finances were required were secured upon their joint credit, and as a consequence thereof the property and income accumulated in such joint undertaking belonged to the spouses in equal shares, pursuant to their agreement, and one-half thereof was economically attributable to each spouse within the purview of Section 1000(d) of the Internal Revenue Code.

4. The Tax Court erred in that its opinion and decision are not supported by but are contrary to its findings of

fact and the evidence, in that the findings of fact disclose the rendition of vital services by Mary L. Holloway and her signature on notes to borrow funds for the business, as well as the fact that she had an agreement with H. M. Holloway that if she would help in the business and not seek outside employment one-half of anything that was made in the business would be hers, whereas The Tax Court in its opinion and decision holds that no part of the property accumulated in the business was economically attributable to Mary L. Holloway. In view of the Tax Court's findings and of the evidence, it was incumbent upon the Court to decide that some part of the property was economically attributable to the wife.

5. The Tax Court erred in that its opinion and decision are contrary to law.

Summary of Argument.

The purpose of the 1942 amendment to the Federal gift tax law was to tax the husband upon the entire gift of community property in the usual case where all the community property had been earned by the husband. The exceptions in the amendment were designed to exclude from this treatment, and tax to the wife, any property "economically attributable" to the wife.

The Tax Court found as facts in the present case, based upon uncontradicted evidence, that (1) Mary L. Holloway took care of the gypsum business during H. M. Holloway's "frequent" absences—for weeks at a time or on all day trips and until late at night; (2) Mary L. Holloway boarded and cooked for men whom Mr. Holloway attempted to interest in remaining permanently to establish a profitable business; (3) the small amount of capital required to get the gypsum business started was borrowed upon the joint credit of H. M. and Mary L. Holloway; and (4) when Mary L. Holloway proposed to return to Los Angeles to seek outside employment, she was persuaded to remain in the primitive quarters at Lost Hills to help establish a sucessful business, with the understanding between Mr. Holloway and Mary L. Holloway that one-half of anything they made in the business would be hers.

Under these circumstances one-half of the community property accumulated in said business and given away in 1944 was derived from personal services actually rendered by Mary L. Holloway. In any event, a very sizeable portion of said gift was economically attributable to Mary L. Holloway; and The Tax Court erred in deciding that no part of the property was attributable to her.

ARGUMENT.

I.

The 1942 Change in Treatment of Community Property for Gift Taxes Purposes.

Prior to enactment of the Revenue Act of 1942 if community property acquired by husband and wife in California subsequent to July 29, 1927, was given away, the gift was deemed to have been made one-half by the husband and one-half by the wife. This rule stemmed from the legal concept that husband and wife were equal owners of such property. See the decision of this Honorable Court in *Bishop v. Commissioner,* 152 F. 2d 389. The same principle governed upon the death of either spouse —only one-half of the community property was taxable in his or her gross estate.

Since both the estate and gift taxes have progressive rates, there were lower taxes on transfers in community property states than on transfers of the same size in common-law states, in the usual cases where all the property of the married couple had been earned by the husband. In an attempt to eliminate this advantage the Revenue Act of 1942 amended the estate tax law to provide in Section 811(e)(2) of the Internal Revenue Code that all community property should be taxed upon the death of husband or wife, "except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse."

A similar amendment was adopted for gift tax purposes, being subsection 1000(d), heretofore quoted, which

presumes that all community property is that of the husband with the same exceptions.

The rule thus adopted for community property was patterned after the rule in effect since 1916 for the estate taxation of joint tenancy property. Upon the death of a joint tenant his estate is taxed upon all joint tenancy property, "except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth * * *."

It will be observed that the wording of the exception in the 1942 community property amendment is not identical with the language covering joint tenancy property. The reason for the difference lies in the nature of community property, for if the amendment had excluded community property which "originally belonged" to the wife, as in the case of joint tenancy property, the argument would have been made that one-half of all community property "originally belonged" to the wife under State law, and hence the purpose of the amendment would have been defeated.

But the purpose and intent were the same, as the Supreme Court recognized in *Fernandez v. Wiener,* 326 U. S. 340, 350:

> "Examination of the legislative history of the challenged statute, as disclosed by the Committee Hearings and Reports and the Congressional debates, can leave no doubt that the purpose of Congress in en-

acting it was the elimination of what was believed to be an unequal distribution of the tax burdens of estate taxes which led Congress to apply to community property the principles of death taxes which it had already applied to other forms of joint ownership, on the death of either of the joint owners. * * *"

As heretofore stated, the 1942 amendment was aimed at the ordinary situation where all the community property had been earned by the husband; and the Congressional reports made it clear that there was to be excepted from such treatment, as in the case of joint tenancy property, all community property "economically attributable" to the wife. The Senate Finance Committee stated (Senate Report 1631, 77th Cong., 2nd Session, C. B. 1942-2, 674):

"The amendments thus make due provision for the exclusion from the gross estate of that portion of the community property which is *economically attributable* to the survivor. * * * Property 'derived originally from' compensation or from separate property of the surviving spouse includes (1) property acquired in exchange for property received as compensation or in exchange for separate property, (2) community income yielded by such property and property acquired with such income, and (3) property which may be traced back to property received as compensation, separate property, income from property received as compensation, or income from separate property. * * *" (Emphasis added.)

A recent Bureau ruling reviews the above legislative history and correctly adopts a liberal view of the expressed Congressional policy:

> "In view of the expressed congressional intent, the terms 'compensation' and 'personal services' appear to have been used in the statute in a comprehensive sense. The former term is not restricted to salary or wages, nor does usage of the latter term contemplate that the personal services of the surviving spouse must have been rendered to a third person. Personal services, within the meaning of the statute, may also be rendered by spouses who are gainfully self-employed, either independently or in a joint enterprise. * * *" (E. T. 20, C. B. 1947-2, 207.)

The 1942 amendment has now become merely interim legislation, for, as heretofore noted, it was repealed prospectively by the Rvenue Act of 1948. In recommending a return to the pre-1942 status of community property for gift tax purposes, the Senate Finance Committee stated (Senate Report 1013, 80th Cong., 2nd Session, accompanying the Revenue Bill of 1948):

> "Similarly the Revenue Act of 1942 amended the gift tax with respect to community property. All gifts of community property were made taxable to the husband, unless it could be established that the property transferred was economically attributable to the other spouse. Unfortunately, a number of problems have arisen under the 1942 amendments. Most important of these is the fact that geographical equalization has not been realized in a typical situation. *Furthermore, the problem of determining the economic contribution of the surviving spouse to the community has resulted in an extremely difficult problem of 'tracing.'* * * *" (Emphasis added.)

II.

The Tax Court Erred in Holding and Deciding That There Was a Break in the Connection Between Valuable Services Rendered by Mary L. Holloway and the Property Given Away in 1944.

The difficulty of tracing property referred to in the preceding quotation is absent in the present case. Neither H. M. Holloway nor Mary L. Holloway had any separate property—or, indeed, property of any kind—when they commenced the gypsum mining business during the depth of the depression. [R. 45.] Any capital needed in the business was borrowed upon their joint credit or was derived from earnings of the business. [R. 48, 52.] Both worked hard over a period of many years to get the business started and to make it a success. [R. 48-52.] It was a joint enterprise or adventure, with the express understanding that the business and profits would belong equally to each spouse. This was akin to a partnership agreement, although the Holloways always regarded the property as community property. [R. 51.]

Since The Tax Court recognizes the value of Mary L. Holloway's services, at least in the early years, the basic premise of its decision against the taxpayer appears to center in its statement that there is no connection between such services and the property given away. This statement seems the more shocking because the property given away represented the avails of the very gypsum mining business which Mary L. Holloway had worked so diligently with her husband to establish.

The Tax Court, to support its decision, states twice that Mary L. Holloway ceased to render services in 1937; and since the Holloways had accumulated no property by

that time, it followed that any property acquired thereafter could not be attributable to services rendered by her. [R. 23.] This theory not only has no evidence to support it but is contrary to evidence in the Record and inconsistent with other findings which The Tax Court makes.

The Tax Court's assertion that Mary L. Holloway "seems to have performed no services" after 1937 is made only in the Opinion part of its report. [R. 23.] The Findings of Fact [R. 16-19] may be searched in vain for any finding that she performed no services after 1937. The findings made by The Tax Court contain a statement that the daughter of Mr. and Mrs. Holloway came to live with them about 1939 and her help relieved Mary L. Holloway "of considerable of her duties." [R. 18.] This finding is completely supported by Mrs. Holloway's testimony [R. 57], and plainly implies that at least as late as 1939 Mary L. Holloway was discharging more than "considerable duties" in connection with the gypsum mining business. It is clearly contrary to the statement in the Court's Opinion that no services were rendered by her after 1937. Furthermore, The Tax Court found, upon evidence, that the assets transferred to H. M. Holloway, Inc., had been accumulated by decedent *and his wife*. [R. 19.]

The record is very clear that no "break" between the services rendered by Mary L. Holloway and "any later business or property," to use The Tax Court's phrase, was intended. Counsel for the Commissioner, on cross-examination of Mary L. Holloway, went into considerable detail regarding the intent of her agreement with H. M. Holloway that one-half of anything the business produced would be hers. Counsel brought out the fact that in 1934 or 1935, when this agreement was made, the gypsum busi-

ness was being conducted on the so-called Theta property, and he inquired whether the agreement was concerned only with that property or was intended to cover other properties that might be acquired in the future. The questions and answers in this respect are as follows [R. 55-56]:

> "Q. * * * Did you have in mind that that related to the Theta and the other properties? A. Whatever property we operated on.
>
> Q. What were you operating at that time, or what you would operate in the future? What did you have in mind? A. Yes, we expected to continue and we wanted to build up a business. We expected to continue.
>
> Q. To continue the operation? A. We were expecting some other leases."

The statement in The Tax Court's Opinion that Mrs. Holloway's services ceased in 1937 is apparently traceable to her testimony that the Lang property was about two miles from the oil derrick and that she went there only a few times. [R. 55.] This, however, does not establish that she performed no services in the business, for there were many services to be performed that did not require her to go to the site of the property, particularly in view of the fact that other employees were hired in the business in the early stages of operation on the Lang property. [R. 54.]

Furthermore The Tax Court's finding, that practically nothing had been accumulated up to the year 1937, is not warranted by the record. The question was asked Mary

L. Holloway on cross-examination as to *"how much money"* had been accumulated by 1937, and her reply was that they had accumulated practically nothing up to that time. [R. 54.] The answer should not be removed from its context, as the Court has done, for the question was limited to accumulations of cash and apparently there had been none. But the business was prospering to the extent that they had employees at that time, as we have just stated, and therefore the business was in such condition that the Holloways could afford to hire such help, and cash that had been earned in the business had been reinvested in equipment. [R. 48.]

It is submitted that The Tax Court's conclusion in this respect is manifestly unfair, as well as being unsupported by the evidence. The stock in question represented assets of a going business, built up cumulatively over a period of ten or eleven years. In the early days it required faith and hope and courage and hard work. As in the case of most growing businesses, when development occurred to the point that employees could be afforded they were hired, to assume some of the drudgery theretofore done not only by Mary L. Holloway but by her husband as well. It is nothing but irony to say, as does The Tax Court, that the success which rewards hard work and permits the hiring of employees is the very factor which leads to the conclusion that there is no connection between the foundation laid by the earlier services and the profits thereafter realized. The Tax Court's view is antagonistic to the average success story of American enterprise.

III.

The Tax Court Erred in Failing and Refusing to Hold and Decide That H. M. Holloway and Mary L. Holloway, Pursuant to a Valid and Reasonable Contract Fully Supported by Adequate Consideration, Were Engaged in a Joint Enterprise or Adventure in Which Each Performed Vital Services and What Finances Were Required Were Secured Upon Their Joint Credit, and as a Consequence Thereof the Property and Income Accumulated in Such Joint Undertaking Belonged to the Spouses in Equal Shares, Pursuant to Their Agreement, and One-half Thereof Was Economically Attributable to Each Spouse Within the Purview of Section 1000(d) of the Internal Revenue Code.

We have heretofore noted that the legislation with which we are here concerned was patterned after the joint tenancy provisions of the estate tax law.

The extreme harshness of The Tax Court's decision is illustrated by the fact that a contrary conclusion would have resulted if Mr. and Mrs. Holloway had agreed, under the circumstances of this case, that the business and profits therefrom would be owned by them as equal partners, or as joint tenants, or one-half by each as his or her separate property.

One case directly in point is *Estate of Lester L. Fletcher,* 44 B. T. A. 429, where the wife invested $1,000.00 in her husband's store and waited on women customers during the 1890's. The spouses orally agreed that she should have a half interest in the business and all property acquired. After 1900 the wife worked in the store only intermittently. An estate of nearly $500,000.00 had been accumulated by the time the husband died in 1937. The Board

held that the wife's contribution to such joint property, in accordance with the oral agreement, was sufficient to exclude one-half of it from the decedent's gross estate. It declared at page 434:

> "* * * Mrs. Fletcher's contribution of $1,000 and her services were adequate consideration for the agreement that she should have a one-half interest in the business and property. * * *"

Although each case must rest upon its own facts, we submit that the services rendered by Mrs. Holloway, in relation to total services rendered in this gypsum mining business, were more vital and important to its success than those which were held to be adequate consideration for a one-half interest in the business in the *Fletcher* case.

A case relied upon in the *Fletcher* case was *Berkowitz v. Commissioner,* 3 Cir., 108 F. 2d 319, which held that husband and wife may validly agree to share profits of a business to which they both devote their services, and that the wife's ownership of such profits depends only upon the contract and not upon whether a formal partnership was created.

With respect to the question of services rendered, we believe The Tax Court's analysis misses the mark. We do not understand the cases dealing with joint property to require proof of the rendition of services having equal value at all times to the date of death or gift. It is enough that the agreement creating the joint tenancy appears reasonable in light of the circumstances existing at the time the agreement is made. This is clearly illustrated by the *Fletcher* case, where the wife performed some services during the 1890's but worked only intermittently after 1900. Probably the parties there did not foresee that when

the husband died in 1937 they would own between them a half million dollars. But the agreement was reasonable when it was made and it was respected for tax purposes. One-half of all the property was treated as originally belonging to the surviving wife.

Similarly, in the present case the parties doubtless did not anticipate the full extent to which good fortune would smile upon them. They were going through dark and trying times. Both were working hard. It looked impossible to get the business started and on a paying basis. Mrs. Holloway wanted to seek paying employment. Without her help, Mr. Holloway could not have carried on. They agreed that Mrs. Holloway would remain and help put the business over, and that she would own one-half of anything the business produced. Mrs. Holloway had contributed and continued to contribute vital services toward the foundation of the business in those early days. Certainly, no one could say that the understanding arrived at in this manner was unreasonable or that it was not based upon adequate consideration. It was a valid, reasonable agreement and, we submit, should be carried into effect in this tax controversy.

This point was firmly and clearly stated by The Tax Court in a very recent case reviewed by the full Court—*Paul L. Kuzmick,* 11 T. C. ..... No. 40 (September 16, 1948)—in which the wife's services had been substantial in prior years but had diminished or ceased during the taxable years. By reason of that fact the Commissioner attempted to tax to the husband her share of income from the alleged partnership of husband and wife. The Tax Court repudiated such a theory, as follows:

> "* * * Under these circumstances the issue depends not on whether or not the wife rendered services

to the partnership but rather on whether or not the purported assignment of a half interest in the contract may properly be regarded as a capital contribution originating with her. * * *

In prior cases a wife's services, no more extensive or vital to business than those here proved were vital to the inventions, have been held sufficient to warrant recognition of an alleged partnership for tax purposes, *Wilson v. Commissioner* (C. C. A., 7th Cir.), 161 Fed. (2d) 661; *Sinne B. Forsythe,* 10 T. C. 417; *Francis A. Parker,* 6 T. C. 974; *Willis B. Anderson,* 6 T. C. 956. And such services rendered in years preceding a formal partnership agreement have been considered relevant as support for the decision reached, *Samuel Goodman,* 6 T. C. 987; *Leo Marks,* 6 T. C. 659; *Felix Zukaitis,* 3 T. C. 814, *even although the wife's services thereafter were reduced* or negligible. *Singletary v. Commissioner* (C. C. A., 5th Cir.), 155 Fed. (2d) 207. * * * Those services had been an essential factor in development of the inventions with which the agreement was acquired, and in a very real sense the wife's contribution to the partnership's income-producing asset originated with her. * * *" (Emphasis added.)

Hence, we respectfully submit that The Tax Court is superficial when it declares that the statute "requires, not contract, but personal services." [R. 23.] The contract merely fixes that which is to be attributed to the respective spouses by virtue of their contribution to the joint enterprise. The statute, as we have seen, was concerned with property "economically attributable" to the wife. It does not unduly strain the meaning of words to say that income is derived from the wife's personal services where it is paid to her pursuant to a reasonable agreement based

upon her rendition of services. This certainly is not one of the "usual" cases contemplated by the statute, where the entire community property has been earned by the husband.

Conclusion.

As stated by The Tax Court, the fundamental issue in this case is whether "any portion of the property transferred to the donees was received as compensation for personal services actually rendered by H. M. Holloway's wife, Mary L. Holloway," or is traceable to such compensation or to her separate property. [R. 15.] Petitioner believes the findings of fact made by the Court *require* the conclusion that some portion of such property was economically attributable to Mary L. Holloway. And it is respectfully submitted that the agreement between the parties, reasonable in the light of the circumstances under which it was made and based upon adequate and full consideration, is determinative as between the parties —and should also be determinative for tax purposes—as to the portion so economically attributable to her.

In view of the foregoing the decision of The Tax Court should be reversed.

Respectfully submitted,

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